Canada

PRICES AND INCOMES COMMISSION

FEE-SETTING BY INDEPENDENT PRACTITIONERS

FEE-SETTING
BY
INDEPENDENT PRACTITIONERS

A Study

for

The Prices and Incomes Commission

By

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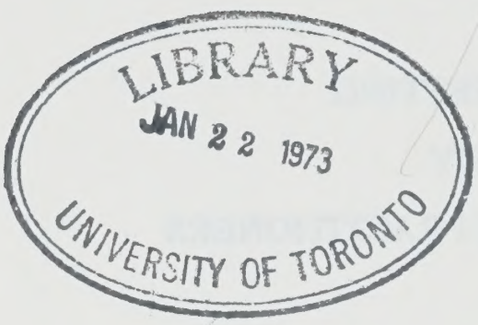

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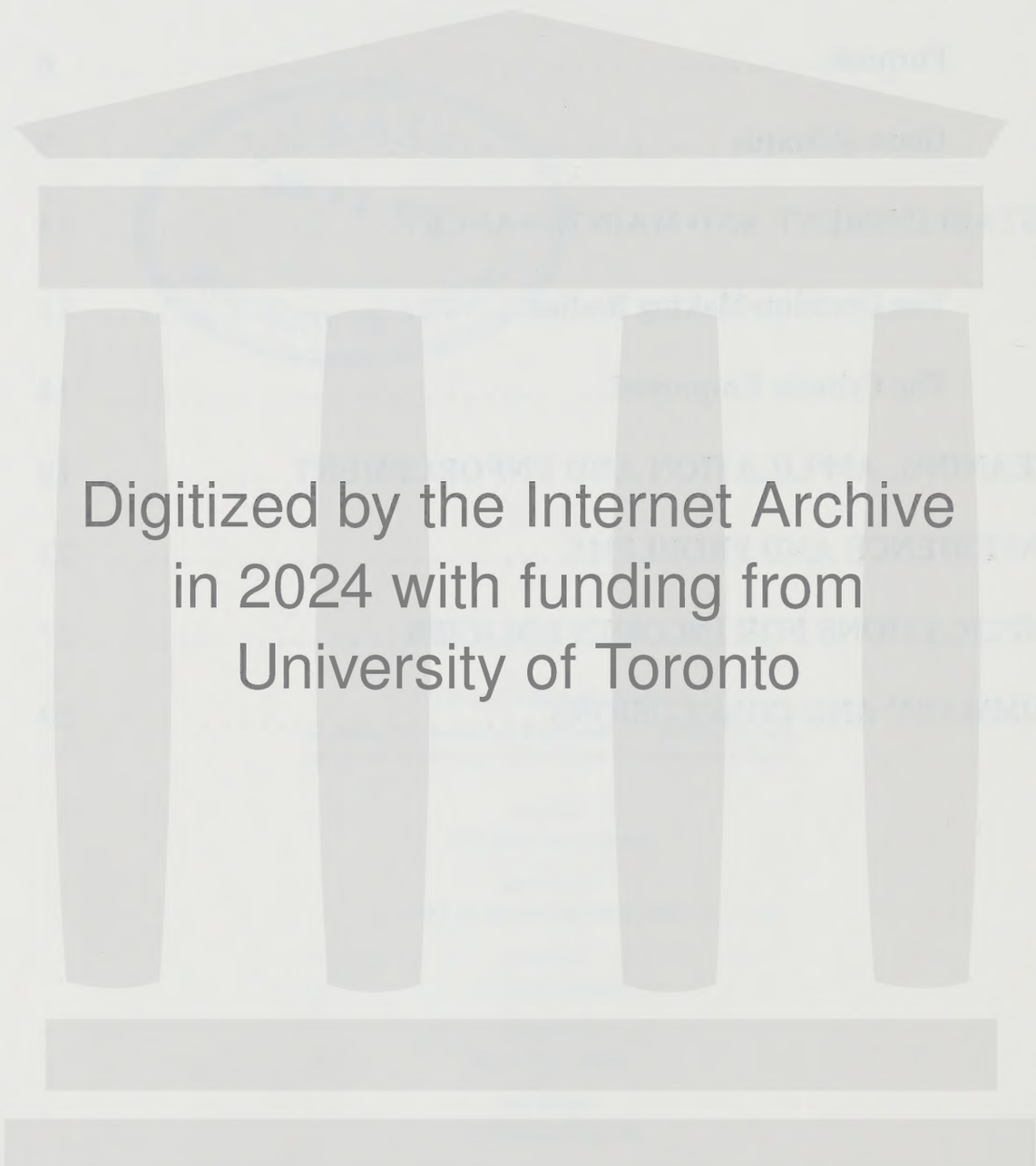

INTRODUCTION

There has been surprisingly little analysis of the manner in which independent practitioners set their fees. This applies whether these charges are determined collectively or individually by the practitioners in question, and despite the growing significance of such activities. This study attempts to begin to fill this important gap in our understanding of income determination although, in the outcome, not as completely as one would wish. Basically, this is a survey of the procedures under which such fees are established. It does not purport to deal in any depth with the economic rationale, or with the equity or fairness of the resulting charges, let alone of the incomes to which they give rise.

The author's concern about this subject goes back many years. It was first aroused by some work undertaken for the Registered Nurses Association of Ontario in the early 1960s with respect to the appropriateness of collective bargaining for professional nurses. This work led to a survey of the means by which other professional groups were pursuing their economic welfare. In a number of instances this naturally resulted in an examination of their fee-setting procedures.

To students of industrial relations, this and other related experiences inevitably lead to an awareness of the fact that collective bargaining, as traditionally and rather narrowly conceived, represents only the middle range in a spectrum of concerted actions in which groups may engage to enhance their economic well-being. At one end of this spectrum is what could be referred to as "collective begging," where groups have so little power that the most they can do is plead their cause in the hope that someone in a position to help them will respond. Although it may seem hard to believe today, professors and teachers were for some time in such a position.

At the other end of the spectrum are groups that have so much power that their organized efforts to improve their lot might most accurately be described as "collective bludgeoning." Looking rather superficially from the outside, one would be inclined to place in such a category many of the organized independent practitioners around which this study revolves. Unexpectedly, however, this survey suggests the need to look upon their activities in a somewhat different light. Although many of these groups do have substantial unilateral powers, there are, as indicated later, more checks and balances at work than might be anticipated at first glance.

Recent interest in fee-setting by independent practitioners has been heightened by reports emanating from the Economic Council of Canada[1] and the Ontario Royal Commission Inquiry into Civil Rights[2], both of which have suggested that increased constraints should be placed on the activities of private licensing and fee-setting bodies. These proposals, in turn, have probably gained increased relevance because of the continuing efforts of the Prices and Incomes Commission to restrain rising prices and costs. Not to be neglected in explaining increasing public concern about these matters is the attention which has been focused on the incomes of certain independent practitioners, especially in the medical profession under medicare.

Because of the paucity of material available on fee-setting by independent practitioners, this study relies almost exclusively on field interviews with those involved in such activities. Appointments were arranged with leading association representatives in Ontario, British Columbia and Quebec, but the sample chosen was broader and in greater depth in Ontario than elsewhere. This is defensible since many of the more sophisticated developments in the setting of fees by groups of independent practitioners are to be found in Ontario. Indeed, in many fields, the lead is clearly taken in Ontario, with other jurisdictions tending to follow precedents set in this province, with whatever modifications seem appropriate to their own particular needs.

Although selective interviewing as a means of gathering primary data has disadvantages as well as advantages, such an approach was indispensable in this study. In most cases there were almost no other sources of information. Fortunately, full co-operation was received from almost all those contacted. In only one instance was information seemingly deliberately withheld. Dependent as the study was on those who co-operated so openly and frankly, it was essential to try to cross-check the material gathered by this means, if only through complementary interviews. The result is a study which the author trusts is as reliable as it can be under the circumstances. Nevertheless, a much more exhaustive investigation would be required to write a definitive treatise on this subject.

The study is divided into seven parts. The first section outlines the scope of the study. The second reviews the history, purpose, and status of the fee schedules employed by independent practitioners. The third examines how such fee schedules are established and maintained. The fourth discusses the application and enforcement of the schedules. The fifth analyses experience with such schedules and problem areas growing out of that experience. The sixth contains a brief assessment of the implications of this experience with respect to the possible implementation of various types of incomes policies. The seventh contains a summary of the study and some conclusions.

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1. Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa, Queen's Printer, 1969).
2. Ontario, *Report No. 1 of the Ontario Royal Commission Inquiry into Civil Rights* (Toronto, Queen's Printer, 1968).

SCOPE OF THE STUDY

The focus of this survey is upon independent practitioners, those who are in practice on their own or in partnership with others of the same vocation. Generally, this excludes salaried individuals, although some of those covered are assured basic stipends which are taken into consideration both in the setting of their schedules of fees or charges and in the calculation of how much additional income they receive from such sources.

Partly because of this overlap between salaried and non-salaried income recipients, it is difficult to determine the precise proportions of those in the different groups in question who are truly independent practitioners. Illustrative both of the problems involved in arriving at such determinations, and of the range in these proportions among some of the professions covered by this study, is the following reference:

> Despite the image of individualism traditionally associated with professional practice, the census lists almost 100 per cent of teachers and nurses as paid employees, while a recent study of the employment status of professional male workers in Canada found that 95 per cent of engineers, 93 per cent of economists, 85 per cent of accountants and auditors, 62 per cent of architects were in this category. Even in the most traditionally individualistic professions, such as law, medicine and dentistry, where 69 per cent, 64 per cent and 91 per cent respectively are presently self-employed, the introduction of new social security measures, such as compulsory legal aid or medicare, may be expected to produce certain anomalies in their employment status. In Quebec, for example, with a public medicare plan for indigent patients, independent practising physicians already find themselves, in effect, in an employment relationship with the provincial government for this aspect of their professional practice. (1)

It should be stressed that this study does not include only practitioners in the professions. However one cares to define the term professional, there are probably some included in the groups studied who would not qualify as such. The distinguishing characteristic throughout has been the existence, if not the prevalence, of individuals in independent practice, not the degree of their professionalism.

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1. Shirley B. Goldenberg, *Professional Workers and Collective Bargaining* (Ottawa, Queen's Printer, Task Force on Labour Relations, Study No. 2, 1968), p. 15.

Among the groups surveyed, the following have received the most attention:

Accountants
Architects
Commissioned Stock Salesmen and Brokers
Dentists
Doctors
Engineers
Funeral Directors
Land Surveyors
Lawyers
Pharmacists
Real Estate Agents

Other contacts were made but are not included in the study for a variety of reasons. In the case of professional athletes and entertainers, for example, there are often minimum fee or salary schedules negotiated, within a collective bargaining framework, with representatives of those normally employing their services. Life insurance salesmen also have been omitted, although there are latent signs of an organized response to their situation, whether they are paid by salary or commission or some combination of the two. Should they decide to take any overt concerted action, the outcome would doubtless be some sort of collective bargaining relationship with their employers. Other groups, such as the Association of Professional Placement Agencies and Consultants, have been passed over because they are still concentrating on raising the professional standards of their members and have only begun to show embryonic signs of becoming interested in fee-setting arrangements.

Despite the mixture of groups involved, from this point on there will be little or no differentiation in their treatment. Rather, references will be made in fairly general terms to the facts and insights derived from examination of all the groups. Where mention is made of particular groups, it will be largely for illustration or emphasis.

FEE SCHEDULES

By way of background, it is instructive to begin with a brief review of the history, purpose and general status of fee schedules promulgated by groups of independent practitioners.

History

There is considerable vagueness about the origins and evolution of the fee schedules now employed by many of the groups surveyed. Sometimes the schedules have a short history and it is easy to document their development. An example is provided by pharmacists in Ontario, who began to publish a guide to fee-setting only a little more than a decade ago. More often fee schedules made their initial appearance on an informal basis and it is virtually impossible to trace their roots. In the medical profession, for example, some of the early schedules can be traced back to the 19th century, although they were then quite local in their application. Many schedules were individualized to the point of being posted by particular doctors after a casual survey of the fees of their surrounding colleagues. Even more informal, and yet influential, were the various forms of customary pricing which characterized charges by many independent practitioners for extended periods. It simply became the local, regional or even provincial practice to charge so much for the drawing of a will, the extraction of a tooth, or what-have you.

Eventually, and in many cases in the 1920s, informal charging practices gave way to more formal approaches. Many pricing scales in the architectural and engineering professions seem to have come into existence in that decade, for reasons that are not easy to discern. The explanation may simply be that the numbers in these professions were only then beginning to reach a level which would warrant and support such organized activity. In any event, from this time on one can trace the gradual emergence of more generally applicable schedules of fees in a wide variety of fields. The transition from highly fragmented and customary or traditional forms of price-setting took place at different times and in different ways in the various fields, but in most cases there were periods of experimentation and consolidation before full-blown schedules were promulgated. The impetus for this shift in emphasis also varied from group to group, as will become apparent in the next section.

Purpose

The reasons for publishing fee schedules vary so widely that it is almost impossible to generalize. Suffice it to say that the factors cited differ in significance within and among the various groups studied, and cannot be ranked in order of importance or, indeed, on any other rational basis. Their treatment here is largely chronological, but even on that basis the presentation is not entirely logical.

Historically, many fee schedules were introduced as a guide or standard for individual practitioners, and especially for newcomers, who otherwise might have no idea what to charge. In this connection it is noteworthy that the educational and training programs for most of the groups studied still do not include any courses on fee-setting or, for that matter, on the general economics of the practice in question. Things are changing in this respect, however. The Faculty of Pharmacy at the University of Toronto, for example, has in its curriculum material on these subjects. In other cases, a special lecture or series of lectures is offered by an appropriate official from the college or association that fosters the applicable scale of charges. The point is that an individual cannot practise independently without some guidance as to what he should charge for his services. As one of those interviewed put it, "You have to have a 'yardstick' of some kind."

Related to this first set of considerations is the need to find some way of differentiating among the charges for various types of services. This problem exists in most of the fields studied and can become acute if, as, or when a group begins to develop sub-categories of specialists of various kinds. This challenge has proven especially difficult in the medical profession, which will be featured prominently in the later and more extended coverage of this topic. For the moment, mention need be made of only one rather tangential point, which arises only among groups disposed, because of the nature of their business, to provide some services for one another. In the case of funeral directors, for example, it is not uncommon for one parlor to undertake part of the funeral arrangements for another when a death occurs in a locality other than that of the intended burial. For this reason, associations of funeral directors have developed schedules of inter-firm charges.

Another role in which fee schedules can prove useful is as a yardstick for clients. Traditionally, many of those engaged in the healing arts have employed tariff schedules as a device to make their patients aware of the general level and the purported fairness of their fees. More recently, architects and engineers have looked upon their schedules as an aid in convincing various levels of government of the validity of their charges. They have met with mixed results, especially at the local municipal level where it is still common for the authorities to attempt to "shop" these professions. At the senior levels of government there is little outright bid-peddling, but sometimes the fees paid are well under the suggested tariff. An interesting commentary on the use of schedules as a guide to clients

came from an accountant who was interviewed. His reaction to this study was a plea that it conclude with a recommendation that accountants adopt a fee schedule so that he could more readily justify his charges to his clients.

In the public mind there is perhaps a predisposition to believe that fee schedules are primarily intended to restrict price competition. There is doubtless an element of this in the fee-setting arrangements of all the groups surveyed. Periodically, for example, the term "fair competition" or something akin to it came up in the interviews. Some who have studied professional fee-setting in the United States place great emphasis on this consideration. Referring to the fee-setting activities of local bar associations in the United States during the 1930s, one authority has written:

> Essentially, however, the purpose of these schedules is to discourage competitive price-cutting and to check the practice some laymen have of shopping around among lawyers, telling each what the other said he would charge and thus trying to get the work done below what it ought to be done for.(1)

This probably overstates the case in most fields today, although there is no doubt that all the groups studied feel that shopping and bid-peddling are both unprofessional from the practitioners' point of view and detrimental to their clients' best interests. The reasons for these widely-held views are cogently stated in a brief presented by British architects to what was then the National Board for Prices and Incomes:

> The provision of a professional service. . .depends on a very considerable degree of mutual trust . . . (which) . . . cannot be expected to survive direct price bargaining between professional and client and its corollary, price competition between suppliers.(2)

Regardless of their other motivations, most of the groups surveyed argued that the main purpose of their fee schedules was to protect professional standards. Obviously, this is the most appealing case for them to make, and accordingly its validity is difficult to assess. Yet, just as clearly, there is something to the view that price-cutting can lead to sub-standard performance. Where the client is unable to assess standards of performance, this can be a very telling consideration. There are other means, however, of ensuring a minimum quality of service. Appropriate codes and disciplinary measures can serve to reduce the risks of inferior performance, although admittedly, only after the damage is done. Nonetheless, such measures seem to provide a far greater assurance of minimum standards of care to patients of the medical profession than do any of its fee schedules. Undoubtedly this is why one hears less about this particular justification for such schedules in the medical field. In other areas, in contrast, the power to license and, in the final analysis, to de-license, appears to afford less protection to the client, if only because he is less able to judge the

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1. Garrison, Lloyd K., *et al, The Economics of the Legal Profession* (Chicago, American Bar Association, June 1938), pp. 153-4.

2. "Architects' Costs and Fees", *RIBA Journal,* April 1968, p. 157.

quality of the service provided. In the case of architects, engineers and land surveyors, for example, it may well be that one of the surest ways of ensuring high performance standards is to insist on a level of fees which will underwrite them. The relationship between fees and standards is emphasized in the case of architects, whose fee schedules invariably spell out in some detail what the client is to receive at various stages in the project for the fees charged. In Ontario for example, the architects' fee schedule is entitled "Conditions of Engagement and Schedule of Minimum Professional Charges."

In effect, groups such as this are taking the position that competition in their cases should be of the non-price variety. Otherwise, they insist, the basic quality of the service will suffer. For anyone who believes that non-price competition is not only insufficient, but often wasteful as well, this view is difficult to accept. Nonetheless, it must be acknowledged that the argument is more persuasive in most of the fields dealt with in this study than it is in the typical market for manufactured goods. This is because the old adage of "let the buyer beware" simply is not as viable a proposition in the former as in the latter areas.

Not to be minimized, as a factor leading to the growing prevalence and significance of more comprehensive and sophisticated fee schedules, is the need to facilitate the administration of welfare, and private and public prepayment and insurance plans of one kind or another. As early as the 1920s and 1930s, the health sciences were forced to give more thought to their tariffs because of the increasing amount of work they were doing for workmen's compensation boards and welfare agencies. For the medical profession proper, however, this was but a prelude to the pressure they were to face, once more general prepaid health and welfare programs came to the fore. It is ironical that some of the greatest pressure in this context was to come from such doctor-administered schemes as Physicians and Surgeons Incorporated. This set the stage for the later "discussions" or "negotiations" which were to take place with government officials, once publicly-operated medicare programs became commonplace. Under any such scheme, it is obvious that one must have some idea in advance of the fees which are to be charged for the services covered, if only for actuarial purposes. Nor can the level and structure of these fees be left entirely to those providing the services, lest the program become a blank cheque for profiteering practitioners like those who have already apparently so abused the various provincial medicare plans.

Other groups besides the doctors have been affected by similar pressures. Because of welfare cases, for example, pharmacists and funeral directors have found their pricing practices subject to greater public scrutiny than would otherwise have been the case. This has forced them to devote more time and effort to the development and justification of their fee schedules. Dentists have been put in a similar position because of the spread of private prepayment plans in their field. As in the emergence of medicare, they see these private plans as but a stepping-stone to state-run "Denticare." Even lawyers are now more conscious of the role of their tariff schedules because of the emergence of

publicly sponsored legal aid plans. So the facilitation of welfare and prepaid plans is not to be minimized as an underlying purpose of many fee schedules. And this applies despite the nebulous status of some of these schedules.

General Status

In the majority of cases surveyed, the power to establish fee schedules, let alone to enforce them, is not specifically set forth in either the legislation creating the groups in question or in their bylaws. Enabling legislation tends to be more specific on these points in Quebec and in the Prairie provinces, but even in these jurisdictions it is not universal and the statutes are seldom very specific on the question of enforcement. Moreover, the more definitive the legislation the greater the degree of government scrutiny, in such forms as required registration of proposed fee schedules or fee changes, mandatory prior government approval of the tariffs or a reserve power to veto them. But more on this aspect of the situation later.

Typical of those statutes which are quite specific on the question of fee-setting is the Engineers Act in the Province of Quebec, which empowers the Corporation of Engineers of Quebec to enact bylaws "to fix tariffs of fees and determine the procedure for their implementation,"[1] subject to the approval of the Lieutenant-Governor-in-Council. Other groups engage in much the same activity without such precise legislative sanction. More often than not, they do so under catch-all powers. Illustrative of groups in this category are the Ontario land surveyors, who appear to rely on a combination of sections of The Surveyors Act[2] for the authority to promote their fee schedule. Section 3 includes as objects of their Association the following:

> ... to regulate the practice of professional land surveying and to govern the profession in accordance with this Act, the regulations and the bylaws;

and:

> .... to establish and maintain standards of professional ethics among its members.

In addition, Section II(i) q. empowers the Association to pass bylaws:

> ... respecting all other things that are deemed necessary or convenient for the attainment of the objects of the Association and the efficient conduct of its business.

Such bylaws have no effect until they are approved in a referendum vote by the membership, but otherwise there would appear to be no restrictions or restraints.

Although many groups promote tariff scales under equally imprecise legislative authority, they do not appear to view their efficacy in a manner noticeably different from that of others who act on more specific authority. Perhaps this is because all the groups surveyed seemed loath to contemplate the

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1. R.S.Q., 1964, Chapter 262, Section 10 (i).
2. R.S.O., 1968-69, Bill 122.

use of serious disciplinary measures to bring price-cutters into line. Should they determine to do so, the legal basis for their activities in this area might prove debatable, to say the least. Regardless of the possible legal consequences, the public relations cost of making an example of members caught violating the fee schedules seems to be such as to deter most groups from risking test cases. As a result, the jurisprudence on this matter is apparently not very clear.

In summary, then, groups which promulgate formal fee schedules seem to do so whether they are specifically so empowered by enabling legislation or must rely on more indirect and sometimes nebulous authority. In terms of effectiveness, there appears to be little differentiation within the spectrum of situations. This may well be because the ultimate commitment is a moral one in any event. If so, then the state of the law is far less significant than the individual and collective attitude of independent practitioners and, perhaps, that of their clients.

ESTABLISHMENT AND MAINTENANCE

There are essentially three basic aspects to be examined in any assessment of the establishment and maintenance of fee schedules. First, there is the question of the decision-making body and more specifically, of those who participate in the determination of these matters. Second, there is the need to identify the criteria the decision makers employ. And third, there are issues concerning the interpretation and the degree of enforceability of the schedules.

The Decision-Making Bodies

To the extent that one can generalize in this area, there is one type of decision-making apparatus that seems to be most common. That is the establishment by the college or association concerned of a special ad hoc or standing committee to update its fee schedule from time to time. Usually such a committee is called the tariff committee, the economic committee, or the like. These committees seldom, if ever, have the power to promulgate fee schedules on their own. Rather, their role is to recommend such revisions as they deem appropriate to the governing bodies, which then make the final decisions, subject to whatever outside regulatory constraints may exist. Some groups also put a proposed fee schedule to a ratification vote by their membership before it is adopted. This appears to be prevalent where there is likely to be a range of opinion within the group as to how far it should go. Where there are such differences, they usually reflect the varying sizes and/or the differing degrees and types of specialization among the firms or partnerships affected. Some groups resort to ratification votes not only to ensure greater acceptance of the fee schedules among their members, but also because they feel such votes will lend them greater credibility in the public arena. Thus, in a recent brief submitted to the Minister of Consumer and Corporate Affairs, the Canadian Association of Real Estate Boards stressed the democratic procedure that lies behind the promulgation of local real estate commission rates. At one point in the brief it is stressed that:

> While the financial arrangements of MLS (Multiple Listing Service) systems differ across the country, the rates are determined by democratic process by the members.(1)

1. Canadian Association of Real Estate Boards Submission to The Honourable S. Ronald Basford in reference to the Economic Council of Canada's Interim Report on Competition Policy, January, 1970, p. 13.

Later on the point is expanded by emphasis of the fact that local boards include other than real estate agents among their members. Although these other members are clearly in a minority, it is suggested that they provide sufficient protection of the public interest.

> Commission tariffs are set within each board by the membership through the democratic process. As previously pointed out, the membership rolls contain many more than just those involved in the selling process, and include government agencies and corporations who are also frequently principals in a transaction. Thus, to all intents and purposes a regulatory body already exists within the composition of the boards.(1)

Other groups that have a less than homogeneous membership may also be subject to certain internal checks and balances, although they seem less disposed to argue that this in itself constitutes a sufficient safeguard of the public interest. In the case of engineers, for example, it is usually only the consulting engineers who are vitally concerned about the promulgation of a fee schedule and, being a minority in their profession, this means they must persuade boards composed largely of employer and employee engineers of the validity of their proposals. In other cases as well, among groups that are party to fee schedules, one can find members who may not receive any of their income from services rendered under the schedule, or may in fact employ some of their fellow members at the specified scales. In addition, some members of the group, who are perhaps finding it difficult to obtain sufficient work at the current tariffs, may be counted on to resist any increases.

Another argument advanced to suggest that the public interest is reflected in the setting of fee schedules cites the use of independent consultants. One group was adamant on this point. It referred to its consultant as if he had the full force and effect of an independent regulatory body. Another group came closer to the truth when its spokesman insisted that its use of a very prominent consulting firm lent "an air of respectability" to its whole fee-setting procedure. On a more serious plane, one cannot altogether dismiss the notion that a reputable consultant brings more objectivity to bear on the subject than practising members of the group in question. This is hardly to suggest, however, that they should be relied upon as custodians of the public interest.

Public involvement may take other less direct but often more meaningful forms. Again the engineering profession provides an excellent case in point. A number of countervailing powers stand in the path of consulting engineers arbitrarily taking advantage of their fee-setting activities. As indicated above, they must persuade their employer and employee colleagues of the validity of their position. They must also be reasonably sure that the architects, through whom their services are usually made available to clients, and major clients themselves, are willing to respect their schedules. Because of this, it is not uncommon for fee-setting committees of consulting engineers to discuss any

1. Ibid., pp.15–16.

proposed changes in advance with such groups. Even then they sometimes have difficulty ensuring acceptability. At the federal level, for example, both consulting engineers and architects have found the Department of Public Works unwilling to abide by their tariffs, especially on large projects. Another example of the constraints which major users can place on the fee-setting activities of independent practitioners is provided by the modifications that Ontario school boards collectively induced the architects to make in their proposed tariff increases for school buildings a few years ago.

The public is most directly involved in the establishment of fee schedules where there is provision for some kind of government control, or at least scrutiny, over such activities. The mildest form of government participation occurs in the Prairie provinces, where it is common for the enabling legislation to require that fee-schedule changes be registered with the Legislature or the Lieutenant-Governor-in-Council. Innocuous as such a simple requirement may seem, it can have a sobering effect on those involved in the promotion of schedule changes. That potential effect is magnified, however, when the law provides that the body to which the changes are to be reported may veto them. Though apparently seldom if ever acted upon, the importance of such a reserve power is not to be ignored. At the least, it is a symbolic but nonetheless useful reminder of where the ultimate power lies in this area.

By far the most stringent form of public protection occurs where the government in effect is a party to the negotiation of fee schedules, or must approve them before they become operative. Examples of the former are coming to the fore in the medical profession, as the full implications of fee-setting under medicare become more apparent. In British Columbia there is open acknowledgement on all sides that the provincial government and the doctors have evolved what, for all intents and purposes, is a formal collective bargaining relationship. In one form or another, such a relationship is bound to spread across the country. As it does it will become more difficult, if not impossible, to affirm that the public interest is ignored in the establishment of medical fees. To the extent that this happens in the future, governments will be as culpable as anyone else for any excesses in this area.

The deliberate use of countervailing power by government is most common in Quebec where many, if not most, tariff schedules published by groups of independent practitioners must be approved by the government before they come into effect. This sometimes leads to prolonged delays in the revision of schedules, much to the annoyance of the groups in question. Even more disturbing from their point of view is the feeling among some groups that their proposals are sometimes treated like political footballs. As in other jurisdictions where government approval is less extensively required, however, there seems to be general acceptance of this procedure. Despite the delays and the politics involved, the appeal of a schedule with government sanction to lend it weight and authority cannot be denied.

Fee-setting in the legal profession and among stockbrokers provides two other examples of forms of third-party involvement that might be construed as being protective of the public interest. With respect to the former, it is noteworthy that it is usual for judges of the provincial courts to set the litigation fees that govern the loser's share of the winner's legal fees when such costs are awarded and that also have some bearing on appeals before the taxing masters. According to many lawyers, such fees constantly lag behind the costs of legal practice, and in that rather distorted sense the judges may be said to be imposing some restraint on those who appear before them, although most lawyers charge their clients the difference between what the judges award and their own fees. Moreover, this partial restraint relates only to litigation fees and does not cover the costs of commercial work, which continue to be influenced more by the tariff schedules set by local county bar associations than by any other institutional considerations.

At least in Ontario, stockbrokers' commissions are now also subject to outside scrutiny and control. In this instance, the third party is the Ontario Securities Commission which has interpreted its responsibilities to include a review of any fee-schedule changes proposed by the Toronto Stock Exchange. So far it has intervened only once to review such changes, and on that occasion it apparently let them go forward without revision. How vigilant the Commission will prove as a protector of the public interest in this area remains to be seen. Nevertheless, it does illustrate the potential role for public regulatory bodies in the field of fee-setting.

The Criteria Employed

Among the most difficult data to unearth are the criteria that different groups use in developing their fee schedules. This is partly because of the variety of factors that they can choose to weigh, but even more because these groups seldom seem to have been asked about such criteria before and thus appear to be at something of a loss in coming to grips with questions about them. This vagueness is gradually disappearing, however, especially among groups that have been under growing pressure to justify their scales of charges. One group, which now relies heavily on a consulting firm to make its case, turned to outside assistance after an embarrassing encounter with a legislative committee, before which it proved quite inept at explaining its position.

Particularly where consultants have been brought into the picture, groups have been more disposed to rely on a combination of variables to bolster their arguments. A report prepared in 1967 for one professional group in British Columbia, for example, emphasized three particular factors: Comparable earnings, the cost of maintaining an office, and billable time. Another group, in Ontario, stressed the following considerations to support a recent fee hike: The rise in the cost-of-living, the increase in the cost of practice, the existence of a wage-cost spiral that would continue to aggravate both the former, and developments in the remuneration of other professions. More precise and in keeping with the factors that unions usually stress in their negotiations is the

formula that determines year-to-year movements in the over-all fee level of B.C. doctors by agreement with the provincial government. In this precedent-shattering case, the average level of fees has been for some time tied to a weighted index, based one-half each on the B.C. wage and price index and the Vancouver cost-of-living index.

Turning individually to the factors considered by different groups in setting their fee schedules, it is appropriate to begin with the oldest of them all. Customary or traditional rates dominated the fixing of fees by many groups until comparatively recently. Suffice it to say today that while custom and tradition still have some bearing on the situation among some independent practitioners, particularly among the older members and in rural areas, the influence of past practice has been steadily eroded by the forces of inflation and related developments. The nearest equivalent to the role played by custom and tradition in the past is the continuing pervasiveness of prevailing rates. Numerous groups today give substantial weight to a survey of the actual charges of their members. This is true even of some groups that do not publish formal fee schedules. No accounting group in Canada has a formal tariff of charges, but some of the provincial accountants' organizations do run confidential surveys of their members' hourly charge-out rates. The results are made available only to the participating firms, and it is difficult to determine how much influence they have on the charges levied by different firms. Conceivably the net effect is a form of price leadership, in which the prevailing rates constantly edge up as firms adjust their billings, at least in part, in relation to what they discover other firms are charging. In any event, there are many groups in which prevailing rates are a major consideration, if only because the members' fees cannot get too far out of line without adverse competitive consequences.

The rising cost-of-living also enters into the thinking of those charged with the responsibility of revising existing fee schedules. Except in the odd case, such as the B.C. medical profession, this variable does not appear to be dealt with on a definitive basis. Nevertheless, it obviously has an influence on the level of fees charged in many fields, if one is to judge by the points raised in conversations with those involved.

Related to the cost-of-living, but much more significant in many cases, are changes in the cost of practice. This has been a major factor among pharmacists, who have devoted a great deal of time and effort to ascertaining the breakdown of their costs structure and to measuring changes in their costs. In one jurisdiction, this has led to the proposed use of a weighted index, based 70 per cent on pharmacists' wages and 30 per cent on the general cost-of-living index. Architects, engineers and real estate brokers have also devoted considerable effort to cost studies. In these cases, however, except where hourly or per-diem rates are charged, the groups are already protected to a substantial degree from rises in the cost-of-living and of doing business, because their fees are based on a percentage of the costs involved, in the first two cases, and in the third, on the value of the property changing hands. One therefore has to be somewhat dubious about fee increases in these areas, when they are defended on the basis

of cost increases. Only when such an increase can be shown to be greater than the virtually automatic upward adjustment of the fee intake can one accept the validity of this argument.

Already mentioned has been the attention paid to wage and salary indices in some cases. More often than not, however, this consideration seems to be brought in as a kind of supplementary argument to rationalize fee-rate increases largely derived from other variables. Given the rapid rise in wages and salaries over the past few years, many groups, finding their tariffs increasing at a somewhat slower rate, have resorted to this comparison, if only as a means of demonstrating their relative lack of aggrandizement.

Productivity – measured nationally or otherwise – is a seldom-mentioned factor in discussions about fee-setting. Perhaps this is because changes in productivity are so hard to measure in many of the areas concerned. Or perhaps it is because, like many service sectors of the economy, these are not fields where there has been much improvement in productivity. When this is the case, there is little of a variable nature to be stressed in making a case for a fee increase. Relative productivity changes, however, do have some bearing on internal structural shifts in the fee schedules of certain groups. Discussed below is the Relative Value Unit pricing system employed by dentists, which allows, over time, for adjustments in the tariff structure to compensate for differential changes in productivity in the provision of various services.

Another variable to be considered is that of profit margins. Where there is a substantial capital commitment, such as in funeral parlors or in brokerage facilities, it is only natural that those involved should expect a fair return on their investment. When practitioners were pressed on this point everything from general surprise to a very specific reply, in terms of a target rate of return, was encountered. With respect to the former, there has been a tendency in some cases to neglect the case for a fair rate of return on one's investment. This is not unlike the situation one encounters in small local retail outlets and service operations, where the proprietor is often satisfied to be able to extract his concept of a living wage, and virtually ignores any foregone investment income. In general, this hardly applies to the groups studied, as groups, but it is characteristic of some of their members.

Finally to be dealt with are two variables, the significance of which is great although hard to pin down. First, there is the group's conception of its relative worth, and second, there is the question of what the traffic will bear. Many considerations influence a group's determination of its appropriate ranking in terms of the existing income structure. Sometimes the effort to find a suitable ranking in the income hierarchy is very sophisticated. For example, one major group hired a leading consultant to help ascertain its comparative worth. In the attempt, the consultant utilized a job evaluation system to compare the work of this group with various levels of management in business and industry, and came up with an appropriate annual earnings target based on these comparisons. He then developed an hourly rate, on the basis of the estimated billable hours that would yield this figure, after deduction of all office and related expenses.

Other groups have not gone this far, but have attempted by somewhat less elaborate means to arrive at a similar result. Thus, in some groups estimates have been made of the required years of study, the costs of education (seldom, by the way, including foregone income), billable time per year, and years of potential earning capacity. Having done all this, however, the group still is left with the need to determine what its members should expect to earn per year relative to the earnings of others. Almost invariably, this is where they begin to make comparisons with similar groups. Just as there are orbits of coercive comparison among unionized workers, so are groups of independent practitioners quite conscious of what others command. Accountants, for example, are often very sensitive to what lawyers can realize, if only because their role as auditors gives them a good idea of the higher fees per hour that lawyers usually extract. Similarly, some dentists seem acutely aware of the disparity between their incomes and those of the medical profession. Not surprisingly members of the latter group, in turn, put considerable stress on maintaining their relative position in the income hierarchy.

All in all, one is almost driven to the conclusion that there is no general rhyme or reason to the fee schedules, or net incomes, of particular groups. This may be an exaggeration, but when one hears spokesmen for such groups emphasizing their feeling that their members are, on the average, worth about so much, one loses faith in the search for a definitive explanation. Only one other consideration comes to mind, and that is consideration of what the traffic will bear. This is probably an overriding factor among many independent practitioners in their own individual billings. The more difficult thing to get at is its importance in the setting of group fee schedules. Although supply and demand considerations obviously play a part, it is unlikely that any of the groups studied collectively exploits its market power to the full. To the degree that its members do so individually, however, a price leadership effect doubtless influences the next revision of the fee schedule. Some groups fully acknowledged this relationship, while others were reluctant to admit even an indirect link between their fee schedules and what the traffic would bear. From a practical point of view, however, it is hard to believe that the ability to extract more from the market does not, in the final analysis, have a good deal to do with the setting of fee schedules.

MEANING, APPLICATION AND ENFORCEMENT

As with everything else connected with this study, it is hazardous to make broad assertions about the operational significance of fee schedules. In the past, they were little more than a yardstick to be applied at the discretion of the individual practitioner. This is still the case in many instances, although there is a trend in favor of treating scheduled fees as minima which should not be breached except under unusual circumstances. As indicated below, however, it is difficult to standardize fees in many situations because conditions vary so much from case to case.

A good illustration of a group that apparently still looks upon its fee schedule as a general guide is provided by the Ontario Dental Association, which specifically spells out the criteria that may lead a dentist to charge less or more than the recommended fee. To quote from its Schedule of Fees:

A practitioner may *decrease* the suggested fee when:

A. The suggested fee would be a definite financial burden to the patient;
B. Certain repeated or multiple services *significantly* reduce the time factor;
C. When the T. (Time) factor is *lower* than the assigned time for a specific service, due to variations in procedures and/or treatment aims;
D. When services are provided primarily as a specific convenience to the practitioner.

A practitioner may *increase* the suggested fee when a dental service:

A. Presents unusual complications;
B. Demands exceptional effort, skill and/or time;
C. Requires greater than normal responsibility;
D. Requires immediate attention at the sacrifice of regular office practice.

Since Ontario dentists have one of the most sophisticated fee schedules covered by this survey, it is not surprising that their list of possible reasons for a variation in fees should be more refined than others. Nevertheless, the above citation does provide a useful resumé of the types of reasons for variations to be found in all of the schedules, albeit in varying degrees.

Two groups that are disposed to treat their scheduled fees as unbreachable minima are architects and engineers. Typical of the relevant phraseology one finds in their bylaws or codes of ethics is the following:

> The fees charged. . . shall not be lower than those currently endorsed by the Association of Professional Engineers and published. . . under the titles "Outline of Services and Scale of Minimum Fees" and "Outline of Services and Scale of Professional Fees to Architects".

Some groups place particular emphasis on prohibitions aimed at fee-cutting as a means of soliciting business. Thus, it is customary for the legal profession to bar anything resembling this kind of activity. Among the improper activities listed by one typical provincial bar association is the following:

> . . . to hold himself out or allow himself to be held out as being prepared to provide professional services at less than prevailing tariff rates in order to obtain professional work.

At the other end of the spectrum are fee schedules that tend to become hard and fast standards, or even maxima. An example of pressures leading in that direction is to be found in the medical profession. Although doctors' fees are far from being standardized at this point in time, there is no doubt that medicare has set in motion forces leading in that direction. Cases where the fee schedule now tends to represent a maximum are few and far between. Perhaps the best illustration is to be found in Ontario, where the net effect of an arrangement worked out between the provincial government and the pharmacists is a fee schedule that may not be exceeded if a pharmacist wishes to remain on what has become a government-recommended list of approved outlets. A milder variation of this same phenomenon is again to be found in the medical profession, which in many jurisdictions now requires its members to give advance notice in writing to their patients if they intend to charge more than the scheduled fees.

Regardless of the general meaning attached to fee schedules, the important thing is how they are interpreted and enforced. Naturally, their application to particular cases remains largely in the hands of the individual practitioner. This is why practices usually vary so much, both within and among the different groups studied. Again, understandably, it is difficult to generalize. Even so, it is possible to draw some broad conclusions. To begin, it is appropriate to note that none of the groups surveyed maintains a general system of surveillance over its members, at least for the purpose of curbing fee-cutting. If anything, more attention is devoted to the opposite problem. Many of these groups are quite sensitive to accusations of over-charging, and maintain voluntary fee mediation services to try to resolve tariff disputes between members and clients. In such situations, the groups often put more pressure on their members than on the clients to accommodate their differences, if only to avoid the possibility of a public airing of the issue.

Their public sensitivity also appears to make these groups uneasy about attempting to discipline members for fee-cutting. Reinforcing this cautious approach to the tariff-shaver is a feeling that strong disciplinary action might be upset in the courts. Nevertheless, most groups are prepared to take steps against any of their number who are found to be systematically breaching the scale of tariffs. Normally, such an offender would be reported by other members and would be called before the appropriate internal committee to explain the actions

in question. Assuming that a verdict of guilty were rendered, the offender could be privately or publicly reprimanded, or in some cases, suspended or barred from practice. Not surprisingly, censure is usually a serious enough threat that steeper penalties are not required. This is fortunate for the groups involved, because of their reluctance to resort to more drastic remedies, for reasons already stated. Indeed, this study did not unearth a single case where fee-cutting by itself had led to the temporary or permanent loss of an individual's right to practise.

Such an extreme penalty is more likely to arise in the event of forms of unprofessional conduct relating to the quality of service rendered. It should be noted, however, that indirectly the strict maintenance of professional standards of performance can reinforce the effectiveness of minimum tariff charges. Where the charge is set little above that permitting a practitioner to deliver professional service, he cannot cut his fees without reducing the quality of his performance. Consistent fee-cutters in such a setting are thus more likely to run foul of minimum standards of performance than of minimum fee schedules. Several groups made it quite clear that the former were the best, and sometimes the only effective, lines of defence against those who otherwise would be regularly tempted to cut fees or peddle bids.

Generally speaking, it would appear that minimum fee schedules have more moral than legal force. This is clearly the case where the power of a group is somewhat nebulous, but it seems to apply even where there appears to be fairly precise authority in this respect. Indeed, even where such schedules are government-approved, there seems to be reluctance to secure compliance through procedures that are bound to attract public attention. Most groups apparently secure greater compliance through moral suasion and emphasis on professional ethics and obligations than through potential penalties. To go beyond measures that keep the problems within their private domains, they appear to feel, will lose more than it can gain. Even so, as long as the threat of a public reprimand or more stringent penalty remains, individual practitioners may well be mindful that it could happen to them. Seemingly, some combination of their own self-interest and the above considerations leads most of them to respect their groups' minimum tariffs. At least this is the view of the majority interviewed for this study.

EXPERIENCE AND PROBLEMS

In this review of the collective experience of independent practitioners with fee-setting, several points stand out. First is the growing prevalence of group-promulgated tariff scales. For reasons already stated, this concerted activity is likely to persist where it now exists, and to spread to new areas. Second is the increasing sophistication involved in the setting of fee schedules. Pressured by the need to justify their activities in this area, and taking advantage of expertise both within their own ranks and of outside consultants, more and more groups of independent practitioners are going to greater lengths to rationalize and justify their fee-setting. Third, partially because of the continuing spread and growing sophistication of fee-setting arrangements, these activities are assuming more significance. Frequently, an even more pertinent reason for this increasing importance is the growing relevance of such fee schedules to prepayment systems of one kind or another.

Along with these developments have come certain direct and indirect problems associated with the promulgation of fee schedules. First and foremost is the problem of explaining the general level of fees that results. Despite the variety of criteria employed in establishing tariff scales, one is left with the uncomfortable feeling that there is no consistent logic to it all. Perhaps, as with most other organized interest groups in North America, there is no valid explanation, beyond an uncertain mix of what each group feels it is worth and what the traffic will bear. Certainly, one senses an almost desperate search among some of the groups surveyed for a rationale that will stand up to public and political scrutiny.

One of the most vexing problems faced by the fee-setters is that presented by the differing natures of the services rendered. There are so many variables involved in many of their fields that standardized fee schedules are sometimes almost meaningless. One American writer suggests the following reasons for the lack of uniformity in fees he discovered in a number of professions:

> Product Differentiation: There are great differences in experience, competence and reputation among persons within the same profession and the fees tend to vary accordingly.
>
> Price Distrimination: Practices in the medical profession are sometimes cited in economic literature as a classic example of price discrimination. Prices vary from nil to quite high figures according to the client's ability to pay.

> Varying relations among costs of supplying the service, supply and demand: A centrally located urban office may be more expensive to maintain, and may necessitate the charging of higher fees. Fees tend to be lower in rural than urban areas, probably due to the nature of the demand curve, the lower cost of supplying the service, and possibly reflecting a lower quality of service. Fees may also vary according to value of service rendered, historical or anticipated relations with clients and other factors.(1)

A summary of another American study of fee-setting in the accounting profession put the issue this way:

> The contention is made that the average CPA appears to have used hourly or per-diem billing rates as a basis for arriving at what he believes to be a reasonable fee far more often than those practising in the professions of law, medicine, etc. To assume, it is suggested, that a fee is reasonable because it can be proven to be arithmetically correct is without practical foundation and ignores the following professional considerations: Importance of the matter, the degree of responsibility involved, the benefit of the services to the client, the novelty and difficulty of the matter, the client's ability to pay, and the relationship of the client to the accountant.(2)

One group that has rejected a standarized fee schedule has given reasons for doing so as follows:

> Fees for orthodontic treatment must be based on the estimated time and effort required to achieve the desired result for each individual case. There is great variation in each case even though, superficially, cases may appear similar. Each orthodontist must assess the extent to which he personally believes he can remedy the patient's need. Thus, a pre-established fee structure is not in the best interest of the patient.(3)

A partial way around the need for a charge-out system more variable than a standardized fee schedule may be found in the growing emphasis being placed on hourly and per-diem rates in many of the groups surveyed. Such rates are often shown for different levels of education and responsibility, and may be assumed to correspond roughly with some of the variables that lead one to be dubious about the validity of uniform rate scales. Even then, however, full allowance for all the different considerations involved is impossible. This is one reason why most of the schedules examined represent suggested minima rather than hard and fast standards. While this has its advantages from the point of view of the groups involved, it does raise questions concerning the earning capacity and worth of the individuals to whom the hourly and per-diem rates apply. In this connection, it is striking, although not really surprising, how much the fees of

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1. Backman, "Professional Fees: Factors Affecting Fee-Setting in the Several Professions," *Journal of Accounting,* May, 1953.
2. Commerce Clearing House, Inc., *Accounting Articles* (Chicago, C.C.H., Inc., 1970). Summary of an article by Paul N. Cheatham, "MAP – The Name of the Game," from the October, 1968, edition of *The Texas CPA,* p. 7120.
3. Statement issued by the Ontario Society of Orthodontists re. the Establishment of a Schedule of Fees for Orthodontic Treatment Approved by the Board of Governors of the Ontario Dental Association, May 11, 1968.

individual practitioners vary. Those at the top of their field and at the peak of their careers may in many fields charge fees several times larger than the suggested minimum rates. This is particularly true in the legal profession, where top-flight men can command many times the scheduled fees. The only upward limit in these cases appears to be the client's willingness to pay, and few clients seem to begrudge the high charges because of the exceptional talents of those in a position to command them.

Another problem that cropped up repeatedly during this survey concerns the relative cost of different types of services. This problem arises even where a group has not splintered into a number of sub-categories of specialists. In the latter event, of course, the problem tends to intensify because of the infighting, both between any remaining generalists and the specialists as a group, and among the different specialists themselves. Most exemplary of this difficulty is the medical profession, which at times bears a striking resemblance to the various skilled trades in the construction industry, arguing and, occasionally, striking over their comparative worth. The problem in the medical profession is aggravated by the fact that their current fee schedules in many cases represent little more than an amalgam of the separate schedules that different sub-categories have developed more or less on their own in the past. In most instances the difficulty has been further compounded by the manner in which internal trade-offs or adjustments have been handled since the promulgation of a comprehensive over-all schedule. In all too many cases, at least until recently, the squeaking wheel got the oil. As a result, the best way any group could improve its relative position was by mounting a strong lobby to make its case before the appropriate tariff or tariff-structure committee. Fortunately that day may now be passing. In B.C., for example, where the association negotiates the over-all level of fees with the government, it retains the power to distribute that increase over the fee schedule as it sees fit. To guide it in doing so, it now gathers a variety of pertinent data, including, in particular, the average earnings of its various sub-categories. Both in B.C. and in Ontario such data have led in recent years to shifts in the tariff schedule in favor of the general practitioner. Even so, as the Ontario Medical Association recently discovered, recalcitrant groups can still cause considerable embarrassment. When the anesthetists were dissatisfied with one round of adjustments, they published their own separate fee schedule and extra-billed their patients accordingly. This was a dangerous precedent from the point of view of the medical profession as a whole, because it invited further government intervention by suggesting the profession could not keep its own house in order.

Only one further but important point remains to be made about the structure, as distinct from the general level, of fee schedules. The two are not as separable as they appear to be on the surface, with respect to the public interest. The structure of a fee schedule can be at times even more important than its over-all level. This is because the structure can lead to distortions in the allocation of the available talent within a group. A case in point is medicine, where there is now a substantial body of opinion, both within and beyond the

profession, to the effect that the relatively high earnings of surgeons, as opposed to those of general practitioners, can no longer be countenanced, if the imbalance in the availability of these two groups is to be corrected. It is in this important sense that anyone concerned with the public interest must consider the structure, as well as the level, of any effective fee schedule.

The group that appears to have gone furthest in coming to grips effectively with the problem of internal relativities is the dental profession. Dental associations have developed a Relative Value Unit system that rates different services according to their comparative degrees of time, skill, complexity and responsibility. One of the many advantages of this approach is that it allows for current productivity improvements, as these are demonstrated by the reduced time required for various services.

Several other somewhat tangential problems could be mentioned, although only one or two will be touched on here. First is the problem of getting independent practitioners to keep track of and, indeed, maximize their billable time. Improvement here could work to everyone's advantage by utilizing the practitioner's time more effectively, thereby reducing the hourly rate necessary to yield a given income. Because of this and other considerations, it is disappointing to discover how badly organized many practitioners are. In part this stems from a reluctance to resort to more businesslike methods in their practices on the ground that this would somehow be unprofessional. This resistance is gradually diminishing among many groups, and more rational procedures for allocating and keeping track of practitioners' time are emerging.

Related to this question is the need for a general re-thinking of the nature of the delivery systems in many of the groups surveyed. In this regard many possibilities come to mind. None is more controversial than that of group practice in the medical profession. Since this issue goes well beyond the terms of reference of this paper, suffice it to suggest that some comparative work be done to ascertain why a practice so prevalent among so many other independent practitioners should meet with such resistance among doctors.

IMPLICATIONS FOR INCOMES POLICIES

For one not enamoured of incomes policies as they have been recently enunciated, it is difficult to be as objective as would be desirable about the implications for such policies of the fee-setting activities of independent practitioners. Clearly, if incomes policies are to take the form of a broad agreement respecting price and wage levels, with or without selective or general controls, they are not going to prove acceptable for any length of time unless they apply to all, or most, other incomes and costs. This is only one of the many difficulties growing out of such measures, although a very important one because of considerations of equity.

Assuming Canada did achieve an over-all agreement on price and wage levels some effective means would have to be devised to enable the appropriate authorities to scrutinize and, where necessary, regulate the fees charged by independent practitioners. To do this effectively, the authorities would in turn have to follow income trends among the groups in question since, at least from an equity point of view, this would be the most important criterion in terms of their respective contributions to a general restraint program. Ultimately, of course, this would compel those in charge of such a program to review productivity developments and the potential for more efficient delivery systems in each of the areas in question.

These same challenges would arise under less comprehensive and demanding incomes policies, but on a far more selective basis. If the emphasis were to be placed on a pressure-point strategy, then in this and other areas of the economy the focus could be confined to out-of-line income or cost movements, which by their very nature invite some investigation. Such analysis might reveal either a bottleneck or a boat-rocking problem, in which event appropriate short- and long-term policies would have to be introduced to cope with the situation.

The point is that the implications for incomes policies of fee-setting by independent practitioners depend very much on how one defines the policies. The more total the attempt to guide or control everything else in the economy, the more complete the effort that would have to be made to regulate the fees of independent practitioners. In any event, more than fee guidelines or controls would be involved, since the important consideration would be the resulting incomes, and this would necessitate attention to such critical variables as the nature of existing and potential delivery systems and over-all productivity improvements in the fields in question.

SUMMARY AND CONCLUSIONS

As emphasized throughout this survey, fee schedules are growing in prevalence, sophistication and significance. Probably the most contentious of these findings is the last. Contrary to this study's conclusion about the increasing importance of such schedules is the view of another recent unpublished study:

> However, such empirical evidence as is available seems to suggest that the fee-setting activities of professional groups have not generally been a very important determinant of the level of fees.

This statement seems misleading, not so much because of what it says as because of what it does not say. Although the force behind these fee schedules is largely moral, they do appear to constitute effective minima in most cases. There are glaring exceptions, however, as in the legal profession, where the tariff for real estate transactions is generally agreed to be too high for a straightforward case. Otherwise, however, fee schedules do tend to put a floor on the tariffs charged. Again, with exceptions, there is usually a wide variation in the individual's ability to charge more than the floor. But regardless of the spread in the actual fees charged above the minimum, there is a tendency for the whole structure of fees to move up together. Quite often the lead is taken by those able to extract substantially more than the tariff. Nevertheless, movements in the minima also have a marked bearing on the general level of the over-all structure. It is in this sense that one should not minimize the impact of fee schedules.

If this is accepted, the most disturbing feature to emerge from this study concerns the inability of the various groups involved to identify exactly the bases for their conclusions that their members' services are worthy of their target net levels of remuneration. More disturbing in some cases was the reluctance to divulge, or even speak in terms of, the actual earnings of the practitioners in question. A spokesman for one group not only hinted that this was nobody else's business, but that it was not terribly pertinent to the issue at hand. It should be added that this was an exceptional reaction. More typical was a kind of squeamishness about coming to grips with what most of the interviewees clearly recognized as central to the whole process of fee-setting.

The general impression left was one of another set of groups not unlike the trade unions. Just as organized workers seem to develop a sense of disturbance about their relative positions in the hierarchy of the personal income structure, and a feeling that it is time to improve those positions, so also may a similar metabolism be at work among groups of independent practitioners. Perhaps,

along with almost everyone else in the country, they are looking rather jealously at the inordinate gains being scored by plumbers and electricians and simply using these breakthroughs as justification for another round of increases for themselves.

In any event, the central issue that emerges is the question of countervailing power. Pragmatically, at least, one may continue to accept the fundamental tenets of Canada's present modified capitalistic system, even though it is based on the pursuit of self-interest on either an organized or unorganized basis. On the positive side, such a system provides a great deal of personal incentive, which in turn seems to yield a high rate of efficiency and productivity. On the negative side, however, is the high cost our society has paid in human and ecological terms. Whatever the net costs or benefits of the system, its operational viability depends upon the maintenance of effective competitive or countervailing forces. In the absence of strong competitive pressures emanating from the interaction of supply and demand in the market place, individuals and groups with any degree of power must be subjected to some other form of checks and balances if they are not to be left in a position to take undue advantage of the rest of society.

Since virtually none of the groups included in this study is fully, or even largely, subject to open competitive forces, the major restraints on their fee-setting and other collective activities must be found elsewhere. In this context, it is noteworthy that in so far as their promulgation of fee schedules is concerned, many of these groups are subject to more checks and balances than is generally appreciated. The countervailing powers that are ranged against them are seldom sufficient, in and of themselves, but they frequently provide a basis for striking an acceptable balance between the private and public interests involved. The prime illustration of a group that is now much more subject to an effective countervailing power than in the past is the medical profession. Under medicare, the role of the state in the setting of doctors' fees has been steadily increasing. Government involvement in this case has already led to outright collective bargaining in one jurisdiction and is likely to have similar effects elsewhere. Many doctors frown on this development as being contrary to their notion of professionalism but their associations have, in most cases at least, begun to accept it as a necessary evil. There still remains the issue of whether the doctors should negotiate with provincial departments of health, where they are bound to find a more sympathetic ear because so many of their number are included in the top echelons of those departments, or should negotiate with some more independent body such as the Treasury Board. Another possibility, which is being explored in Ontario, is to have an advisory body composed largely of laymen to counsel the government on its deliberations with the doctors. In any event, the handwriting is already on the wall in the medical profession and, provided a legitimate form of collective bargaining emerges, an effective degree of countervailing power will be put in place.

Many other constraints besides outright collective bargaining can affect the fee-setting activities of independent practitioners. Among those mentioned earlier are private as well as public prepayment plans, and the administration of

welfare cases. In a few instances, restraint is exercised by intermediary groups, who employ other independent practitioners on behalf of the ultimate clients involved. As noted above, consulting engineers normally consult architects about the validity of any proposed increase in their fee schedules. Still another check is provided by large users of the services in question. Architects and engineers have both discovered that major government departments and public utilities can be quite independent about the fees they are willing to pay. The ultimate power any large employer, or group of employers, of a particular service enjoys is the potential capacity to absorb the function into its own operations. Almost every group studied is vulnerable to this kind of vertical integration. For example, some large institutions have their own architectural and engineering departments. Also, many firms now have their own legal departments. Again, hospitals employ their own pharmacists. About the only group that is at least partially free of this threat is the accounting profession, which is protected by the legal requirement of an independent audit.

Still another possibility is to subject such groups to the full force and effect of the Combines Act. The Economic Council of Canada favors this as one of a number of alternative strategies designed to curb the arbitrary exercise of fee-setting power by certain groups.(1) Pharmacists are already subject to the combines legislation because they handle goods. In their case there is little doubt that the legislation has had a salutary effect. Nevertheless, this hardly seems the most appropriate answer in most cases, unless one's aim is to eliminate all fee-setting activities. Such an aim would be less than realistic, since these activities are, in most cases, both inevitable and desirable—inevitable because they are unavoidable under any kind of prepayment system, and desirable because all concerned have a need for some standard of comparison.

This is not to say, however, that competition policy does not have a more active role to play in many of the groups studied. It does, but not in the area of fee-setting as such. Instead, its place is in relation to such matters as entry and licensing, and the maintenance of minimum standards of professional conduct, especially in connection with such issues as the solicitation of business. Although these matters lie somewhat beyond the terms of reference of this paper, they are highly germane to its central findings. Several conclusions follow:

In the first place, it would seem essential to separate licensing and related activities from those pertaining to fee-setting. Otherwise, it might prove too tempting to use one's potential powers to reduce entrance into a field to bolster one's fee-setting activities. Even the appearance of such a possibility must be avoided. Appearances can be deceiving, however, and for this reason there must be more than an outward separation of the licensing and fee-setting activities. With respect to the licensing and related professional responsibilities of groups of independent practitioners, much is to be said in favor of the recommendations of the McRuer Report(2) in Ontario, although they do not go far enough. The

1. Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa, Queen's Printer, 1969).
2. Ontario, Report No. 1 of the Ontario Royal Commission Inquiry into Civil Rights (Toronto, Queen's Printer 1968).

McRuer Report calls for an unspecified number of outsiders to be named to the governing bodies of self-licensing professional bodies, a recommendation that the Government of Ontario has, in most cases to date, interpreted to mean two, one a lawyer and one a layman.

Especially where these bodies have large governing councils, this amounts to little more than a token gesture in the direction of protecting the public interest. Preferable would be a mandatory ratio of at least one-third of the membership of the licensing and disciplinary body to be drawn from outside the group. In addition, instead of having the Lieutenant-Governor-in-Council name all those involved, there should be a variety of sources of appointment including, where the numbers involved are sufficiently high, individuals selected by the Consumers' Association of Canada, the universities and community colleges, the labor movement and the Chamber of Commerce, to cite some of the more obvious sources. It would also be desirable to require the outside members of such bodies to file an annual report assessing the extent to which they feel the group in question has lived up to its obligations to the public. Clearly, this would be to ascribe to the outsiders involved a watchdog role, which is exactly as it should be.

One area of professional conduct that requires extensive investigation is that pertaining to the fairly elaborate prohibitions that most of these groups have established to preclude the active solicitation of business. Although one can appreciate the need to bar extreme forms of competition in most of these groups, it is questionable whether the sweeping prohibitions that now prevail are justifiable. Hopefully, the proposed outside members of licensing bodies would make this issue an early focus of attention. They would certainly owe it to themselves to develop an appreciation of the need for whatever prohibitions are to remain. Equal attention should also be devoted to prohibitions directed against various forms of organization for the delivery of the services in question. Among other issues in this context are those of group practice and the integrated use of more technologists or technicians, as well as other less-qualified personnel.

Although competition policy is part of the answer to protecting the public interest from undue exploitation by fee-setting groups, it does not provide a long-run answer. Over time, the only solution to inordinately high charges for any service is to make more qualified people available to supply that service. Thus, open entry, reasonable minimum standards and ample educational and training facilities are the most effective continuing restraints. In the meantime, other forms of countervailing power must be brought into play. Failing all else, it would seem reasonable to require largely unrestrained fee-setting bodies to seek approval for their proposals before an appropriate review board, perhaps in the form of a body such as a reconstituted federal-provincial prices and incomes commission. This would be a distinct improvement over the present arrangements in some jurisdictions and fields, where fee schedules do not become operative until they are approved by the Lieutenant-Governor-in-Council. Too often such approval appears to be based either on a too-cursory analysis or on overly-political considerations.

There are two other recommendations that emerge from this study. The first is that all fee schedules and fees should be subject to complete disclosure, both on a collective basis to the public at large and on an individual basis between the practitioner and his client. Group-promulgated fee schedules obviously must be disclosed, since only then can one begin to assess whether the public interest is adversely affected. The fees that individual practitioners intend to charge their clients should also be made known in advance, for reasons which have been cogently summarized by one American dentist:

> I thoroughly believe in telling every patient in advance what the fee will be. If it needs further explanation, I am glad to do so. I feel if the dentist is afraid to explain his fee to his patient, very likely the fee is too high.(1)

Secondly, well-publicized appeal machinery should be made available in all areas where group fee-setting is common. Such machinery could take a variety of forms, although an ombudsman-type arrangement has much to be said for it. One possibility would be to have the public members of the licensing bodies referred to above serve in this capacity. In any event, some neutral but informed body should be readily available to resolve fee disputes between practitioners and clients. This appeal machinery should be much more widely publicized than are the procedures now offered by some groups. For example, although taxing masters are available to arbitrate differences between lawyers and their clients, the existence of such a service does not appear to be widely known.

To conclude, a brief summary of the highlights of this study: The evidence suggests that the promulgation of fee schedules by groups of independent practitioners will continue to grow in prevalence, sophistication and significance. Seemingly, these trends are both inevitable and, to a large extent, desirable. They do, however, raise a fundamental challenge, which is to ensure that no group is left in a position to exploit unilaterally its fee-setting powers to the disadvantage of the public. Although many of the groups studied are subject to checks and balances of one kind or another, these forces are often not sufficient to ensure adequate protection of the public interest. In all these situations, the objective should be a system of countervailing power that permits an appropriate reconciliation of the private and public interests involved.

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1. Erickson, Donald O., "Selecting a Fair Fee," *North-West Dentistry* (Sept.-Oct., 1969), p. 268.

Fee-setting by Independent Practitioners